

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 1437 OF 2004

Shrimant Mahadeo Gadekar & others.

... Appellants.

Versus.

Jagannath Bhanudas Gadekar & others. ... Respondents

Shri N.P.Shimpi for the Appellant.

CORAM : ABHAY S. OKA, J.

DATED : 9th March, 2005.

P.C.:

1. This Second Appeal is by the original Plaintiffs. The Appellants/Plaintiffs are owners of land bearing Block No.724 abd 725. The case of the Appellants/Plaintiffs is that a water channel was created by their ancestors which passes through their land bearing Block Nos.724 and 725. The case of the Appellants is that the Respondents who had recently purchased land bearig Block No.723 were attempting to destroy the water channel which was passing through the Appellants' land.

2. The learned trial Judge decreed the suit by restraining the Respondents by a decree of perpetual injunction from causing obstruction to the water channel situated in the land of the Appellants and the Respondents were directed to restore the original possession of the Appellants. In the Appeal preferred by the Respondents the said decree has been set aside.

3. The learned Counsel appearing for the Appellants submitted that as a result of setting aside the decree passed by the trial Court, the Respondents may interfere with the water channel which is admittedly passing through the property of the Appellants bearing Block Nos.724 and 725. He submitted that in the Written Statement the case of the Respondents was of a total denial.

4. The Appellate Court has recorded a finding that it is disclosed from the map prepared by the Surveyor from the office of the District Inspector of Land Records that a portion of the water course passes through the property of the Respondents bearing Block No.723. The Appellate Court has recorded consent of the Respondents to the Appellants creating a water course through their own property. The Appellate Court in paragraph 7 of its Judgment has referred to the stand taken by the Respondents in the Written Statement as under:

"The Defendants in their pleadings have made it is clear that they have absolutely no right, title and interest in the water course which is situated in plaintiffs' lands."

In paragraph 8 of the Appellate Court observed thus:

"The Defendants have absolute no objection for creating water course by the Plaintiffs through their own land. It is, therefore, clear that the Plaintiffs have absolutely no cause of action for filing the suit and claiming perpetual injunction against the Defendants."

5. The Appellate Court has set aside the decree of perpetual injunction granted in favour of the Appellants on the ground that there is no cause of action for the Appellants to claim any injunction as the Respondents have no objection for the water course in the property of the Appellants bearing Block Nos.724 and 725. In view of this position, so far as the water channel passing through the property of the Appellants is concerned, they are well protected. The decree for mandatory injunction has been set aside as the Appellate Court found that part of the water course was passing through the property of the Respondents bearing Block No.723 over which the Appellants have admittedly no right, title or interest.

6. In this view of the matter no interference is called for. The Second Appeal is dismissed with no order as to costs.

Judge.